

**United States Department of Labor
Employees' Compensation Appeals Board**

T.M., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Long Beach, CA, Employer**

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**Docket No. 16-1033
Issued: June 22, 2017**

Appearances:

*Whitney S. Rivas, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 20, 2016 appellant, through counsel, filed a timely appeal from a February 24, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective October 20, 2013; and (2) whether appellant has established continuing disability after October 20, 2013.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 10, 1988 appellant, then a 49-year-old staff nurse, filed an occupational disease claim (Form CA-2) alleging that on May 8, 1988 she suffered low back pain while turning a patient in bed. She stopped work on May 9, 1988 and returned to work in October 1989 for one day. Appellant has not worked since that time. OWCP accepted her claim for low back strain. On June 30, 1989 it terminated appellant's wage-loss compensation and medical benefits for low back strain as she was no longer disabled due to the accepted low back strain.

On March 21, 1990 appellant requested reconsideration of the termination of her wage-loss compensation and medical benefits. OWCP referred appellant to Dr. David Geddes, a Board-certified psychiatrist, for a second opinion evaluation. In a report dated July 20, 1990, Dr. Geddes diagnosed dysthymia, psychological factors affecting physical condition, passive/aggressive personality disorder, status sprain/strain of lumbar spine, and spinal degenerative disease. He also concluded that appellant was temporarily totally disabled. On August 23, 1990 OWCP accepted that she had sustained psychiatric factors affecting her physical condition, with dysthymia. Appellant received compensation on the periodic rolls as of August 26, 1990.

To determine appellant's work capacity on June 2, 2008 OWCP referred appellant to Dr. E. Richard Dorsey, a Board-certified psychiatrist, for a second opinion evaluation. In this July 3, 2008 report, Dr. Dorsey diagnosed depressive disorder originally precipitated by the accepted occupational back injury which had persisted continuously from that date. He noted that there had been multiple subsequent aggravating factors, including appellant's current physical health problems, which constituted the predominant cause of her current depression, but that this did not negate that the original precipitant was occupational. Dr. Dorsey noted that she was capable of gainful employment.

On April 3, 2009 OWCP reduced appellant's compensation based on her ability to earn wages as a medical assistant. Appellant requested reconsideration and OWCP denied modification of this decision on July 15, 2009 and September 2, 2010. After an appeal to the Board, however, in a decision dated October 7, 2011, the Board reversed these decisions, finding

³ Docket No. 92-1678 (issued June 17, 1993). The Board affirmed OWCP's decision denying reconsideration as appellant's request was untimely filed and failed to demonstrate clear evidence of error in denying wage-loss compensation for the period June 30, 1989 to January 15, 1990; Docket No. 11-0078 (issued October 7, 2011). The Board found that OWCP had failed to establish that appellant's wage-earning capacity was represented by the constructed position of medical assistant.

that OWCP had not established that appellant's wage-earning capacity was represented by the constructed position of medical assistant.⁴

Appellant continued to receive treatment from Dr. Christopher Cheng, her treating Board-certified family practitioner. In an April 28, 2009 report, Dr. Cheng noted that appellant had been suffering from chronic pelvic pain for one year and that this condition has made her unable to work. He also noted that the following medical conditions contributed to her inability to work: depression, osteoporosis, osteoarthritis of the knees, breast cancer, chronic cystitis, diabetes, essential hypertension, hyperlipidemia, and asthma.

Appellant also saw Dr. Jory F. Goodman, a Board-certified psychiatrist. In a March 29, 2009 report, Dr. Goodman's diagnoses included: major depressive disorder, severe, without psychosis, chronic, herniated disc L3-L4, hypertension, type 2 diabetes mellitus, chronic interstitial cystitis with recurrent urinary tract infections, degenerative joint disease, status post bilateral simultaneous knee replacement, breast cancer post radiation therapy with chronic maintenance tamoxifen treatment, hyperlipidemia, and osteoporosis. He noted that appellant continued to be totally and permanently disabled as a result of her psychiatric conditions.

In a letter dated February 21, 2012, the employing establishment requested that OWCP obtain a current medical report.

On April 26, 2013 OWCP referred appellant to Dr. Ana M. Andia, a Board-certified psychiatrist, and Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for second opinions.

In a May 15, 2013 report, Dr. Ma determined, after physical examination and review of appellant's records, that the work injury of May 8, 1988 was only a musculoligamentous type of low back sprain/strain. He noted that appellant had multiple nonindustrial conditions, specifically noting a knee replacement and pelvic pain, and that these were the reasons that she was not working. Dr. Ma noted no objective residuals from her work injuries, and that multiple physicians had indicated this over the past 25 years. He noted that appellant's physical limitations were due to multiple other nonwork-related conditions. Dr. Ma opined that appellant could be gainfully employed at her usual work duties.

In a May 23, 2013 report, Dr. Andia indicated that appellant's initial onset of depression appeared to be due to the low back injury, but her current depressive symptoms had not been aggravated by her low back pain, but by multiple stressors that she encountered since her back injury. She noted that appellant's stressors included her son's skateboard accident in 1993 when he cracked his skull and was in a coma for five days, her daughter's rape in 1993, her husband's depressive episode in 2000, another daughter's automobile accident with loss of consciousness, and followed by a 10-year depression when her husband left. Dr. Andia also noted that appellant was depressed because she had to undergo bilateral knee replacements and had undergone treatment for breast cancer. Also recently her husband had suffered a stroke, and a daughter was diagnosed with multiple sclerosis (MS).

Dr. Andia opined that appellant was not likely to improve, and that she needed further treatment to prevent further compensation. She indicated that appellant did have dysthymic

⁴ Docket No. 11-0078 (issued October 7, 2011).

disorder, which was now caused by multiple nonwork-related aggravating stressors, and that appellant also had nonadaptive personality traits. Dr. Andia noted histrionic personality traits that caused appellant to exaggerate her symptoms, which might include exaggeration of back pain despite the fact that it was diagnosed to be musculoligamentous strain, as it should have resolved within a few weeks of the original injury. She also noted that appellant had dependent personality traits and these caused her to go to excessive lengths to obtain nurturance and support from others. Dr. Andia opined that appellant could not return to work as a nurse, and noted that even if she were able to work, she was now 74 years old and her age would preclude her from any occupation. She noted that the reason for continuing treatment at this time was to prevent further decompensation that would necessitate psychiatric hospitalization. Dr. Andia noted that the personality disorders were a result of nature and nurture and not related to factors of appellant's employment.

On September 3, 2013 OWCP proposed terminating appellant's wage-loss and medical compensation benefits, as the weight of the medical evidence of record established that she no longer had any residuals of her accepted work-related medical conditions as a result of the May 8, 1988 work injury. Appellant was afforded 30 days to respond to the proposed termination.

By letter dated September 20, 2013, appellant alleged that Dr. Ma had asked her to bend and extend beyond her capabilities during her examination. She also disputed Dr. Andia's report, contending that her husband had not had a stroke, and that her daughter had MS since she was three and lived with her husband and their other children. Appellant stated that her daughter's MS did not make her depressed.

Appellant submitted summaries from an October 11, 2012 appointment with Dr. J.A. Bernbeck, a Board-certified orthopedic surgeon, and an August 17, 2012 visit with Dr. Vikas Mehta, a Board-certified neurosurgeon. These reports listed appellant's weight, blood pressure, pulse, and temperature, but did not contain any discussion of her health issues. OWCP also received an August 6, 2009 dexta bone density study by Dr. Annie Lee, a Board-certified radiologist.

In a July 11, 2012 report Dr. Cheng, Board-certified in family medicine, listed appellant's primary health problem as strain of neck, with other listed conditions which included uncomplicated diabetes type 2, hyperlipidemia, osteoporosis, intermittent asthma, osteoarthritis of lower leg, depression, chronic cystitis, cataract, history of knee joint replacement, history of cancer of the breast, lumbar spondylosis, obesity, and essential hypertension.

On March 30, 2013 Dr. Gordon Haugland, a Board-certified diagnostic radiologist, interpreted medical images of appellant's cervical spine and found straightening of lordosis with degenerative changes and listhesis, but no indication of fracture.

In a decision dated October 8, 2013, OWCP terminated appellant's remaining wage-loss compensation and medical benefits effective October 20, 2013. It determined that the weight of the medical evidence established that she no longer had any residuals from her accepted employment injury of May 8, 1988.

On October 31, 2013 appellant requested an oral hearing before an OWCP hearing representative.

At the hearing held on July 10, 2014, counsel argued in her opening statement that OWCP had not met its burden of proof to terminate appellant's compensation benefits. Appellant testified regarding her appointments with Drs. Ma and Andia. She noted that she was 75 years old, discussed her employment history, and indicated that she had worked as a nurse for close to 18 years. Appellant testified that she has fully recovered from breast cancer and knee surgeries. She stated that her son was never in a coma although in 1988 he did hit the back of his head, was hospitalized, that he was sent home from the hospital on third day, and that he completely recovered from this remote event. Appellant stated that her son-in-law took good care of her daughter who had MS. She noted that her other daughter was married in 2000, that her husband left after two months and returned to Malaysia, that her daughter was upset at the time, but was not depressed today, and that she was not upset about her daughter's history nor her divorce. Appellant testified that her neck hurt every day and that her back had hurt since the employment incident. She noted that she could not stand for more than 10 minutes at a time due to back pain. Appellant indicated that she utilized a cane, cushions, and an abdominal binder to assist her with the pain. She testified that she was currently receiving counseling for her depression. Counsel argued that appellant's testimony established that Dr. Andia's report was not well-rationalized or based on an accurate factual history.

In a statement dated August 7, 2014, appellant's husband confirmed that he never had a stroke.

The hearing representative affirmed OWCP's termination decision on September 10, 2014.

On October 1, 2014 appellant, through counsel, requested reconsideration. Counsel argued that, in terminating benefits, OWCP had erroneously placed the burden of proof on appellant to show continuing residuals, that Dr. Andia's conclusions were not based on a proper factual history, and that her report could not be used to satisfy OWCP's burden to terminate benefits. She also discussed Dr. Dorsey's report.

In support of the reconsideration request, appellant submitted an April 8, 2014 report, wherein Dr. Dorsey determined that she met the criteria for a diagnosis of major depression, which was a more severe form of dysthymia. Dr. Dorsey believed that appellant continued to experience symptoms of depression, which were precipitated by the original occupational injury, that according to her history and records, had continued without any period of complete resolution. He noted that she was free of mental symptoms until she injured her back, developed depression in response to that specific injury, and continued to experience depression from that date to the present, aggravated by other physical health problems and life events, but not precipitated by these. Dr. Dorsey opined that, from a psychiatric perspective, appellant was not presently able to work. He concluded that, based on all the information available to him, the predominant cause of her current depression was the original occupational physical injury with continuing pain and disability. Dr. Dorsey further opined that other medical and life circumstance problems may be contributory or aggravating, but were not causative. He noted that appellant was likely to need psychiatric treatment for the foreseeable future.

By decision dated February 13, 2015, OWCP denied modification of its prior decision. It found that since it was determined in 1989 that appellant no longer had residuals from her low back strain, it would follow that she no longer suffered residuals from the mental conditions associated with the injury. OWCP determined that Dr. Dorsey's opinion was speculative.

On November 26, 2015 appellant, through counsel, again requested reconsideration. She argued that OWCP had not met its burden of proof to terminate her benefits on October 8, 2013. Counsel argued that she was denied due process, and that the evidence of record established that she still suffered residuals of the accepted work injury. She argued that appellant testified under oath that Dr. Andia's opinion was based on false facts and that OWCP failed to make essential findings of fact. Counsel subsequently submitted a supplemental letter arguing that Dr. Andia's report was insufficient to overcome evidence of continued disability or meet OWCP's burden especially as long as substantive challenges to her report remain unaddressed. She also argued that even if appellant's physical injuries had resolved, she still had a disabling emotional injury. Counsel asked that the termination decision of October 18, 2013 be vacated and benefits restored to appellant.

Counsel also submitted a supplemental letter from appellant. Appellant noted that she was sent to a physician who suggested neck surgery. She indicated that she had stenosis of the neck, back of head, and low back. Appellant related that she suffered from severe depression, chest pain, uncontrolled diabetes, and sciatic pain. She also submitted a letter disputing Dr. Andia's statement that her depression was due to her children, and alleged that most of Dr. Andia's report was made up.

New evidence submitted with the reconsideration request included a February 23, 2015 magnetic resonance imaging (MRI) scan report interpreted by Dr. Peter Wong, a Board-certified surgeon, as unchanged degenerative disc disease of the lower thoracic and lumbar spine, particularly severe at L4-5. A March 3, 2015 MRI scan was interpreted by Dr. Wong as unchanged degenerative disc disease of the lower thoracic and lumbar spine, particularly severe at L4-5. A November 17, 2015 bone scan was interpreted by Dr. Aarti Kaushik a Board-certified radiologist, as showing no definitive evidence for osseous metastatic disease and post-traumatic changes in the right ribs.

By decision dated February 24, 2016, OWCP denied modification of the February 13, 2015 decision. It determined that the newly submitted evidence was insufficient probative value to modify the February 13, 2015 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits. After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵

⁵ *Kenneth R. Burrow*, 55 ECAB 157 (2003); *see also T.D.*, Docket No. 15-1938 (issued July 11, 2016).

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that as a result of her employment incident on May 8, 1988, appellant suffered low back strain, dysthymia, and psychological factors affecting her physical condition. By decision dated June 30, 1989, it terminated her compensation benefits for the accepted condition of low back strain. In a decision dated October 8, 2013, OWCP terminated appellant's remaining wage-loss compensation and medical benefits, effective October 20, 2013 based on the report of Dr. Andia. This termination decision was upheld by the hearing representative on September 10, 2014.

The Board finds that the weight of the medical evidence establishes that OWCP properly terminated appellant's wage-loss and medical compensation benefits, effective October 20, 2013. The Board finds that the weight of the medical evidence rests with the opinions of Dr. Ma and Dr. Andia.

The Board has held that the weight of a medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the medical rationale expressed in support of stated conclusions.⁸

Dr. Ma noted that the employment injury of May 8, 1988 was only a musculoligamentous type of low back sprain/strain. He indicated that appellant had multiple nonindustrial conditions, notably a knee replacement and pelvic pain, but that there were no objective residuals from her work injuries. Dr. Ma opined that appellant could be gainfully employed at her usual work duties.

Dr. Andia, after reviewing appellant's medical history and conducting an examination, found ongoing mental issues and concluded that she suffered from dysthymic disorder and personality disorder. She indicated that appellant's condition was chronic, that it was not likely to improve despite active treatment, but that appellant needed to continue treatment to prevent further decompensation. However, Dr. Andia reasoned that while a factor of employment was the initial cause of appellant's depression, that injury occurred in 1988, that she has been off work since that time with the exception of one day in 1989, that she had multiple stressors, and that therefore her ongoing depressive symptoms were more likely to be secondary to nonwork-related stressors than the original work stressors of her back pain and back injury. The reports of Drs. Ma and Andia are based upon a complete and accurate factual and medical history. Both physicians performed comprehensive evaluations and found that appellant's remaining medical

⁶ See *T.P.*, 58 ECAB 524 (2007).

⁷ See *I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *J.J.*, Docket No. 15-0475 (issued September 28, 2016).

conditions were no longer related to the accepted medical conditions.⁹ The Board finds that these reports establish that appellant's remaining medical conditions at the time of the termination of benefits were not related to the employment injury.

The reports of the remaining physicians, which were of record on the date of termination of benefits, do not indicate that OWCP improperly terminated appellant's benefits, effective October 20, 2013. The June 2, 2008 report of Dr. Dorsey, the April 28, 2009 report by Dr. Cheng, and the March 29, 2009 report by Dr. Goodman were written four to five years prior to the date of the termination of benefits. Accordingly, these reports are too remote in time to address whether appellant had any lingering effects from her employment-related injury as of October 20, 2013. The Board has held that stale medical evidence cannot form the basis for current evaluation of residual symptomatology, disability determination, or other medical determinations.¹⁰

Moreover, the reports of 2012 and 2013 from Drs. Bernbeck, Mehta, Haugland, Lee, and Cheng do not address the cause of appellant's currently diagnosed conditions, nor do they discuss her ability to work. As such OWCP properly determined that these reports were of limited probative value and were insufficient to create a conflict in the medical opinion evidence.¹¹

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates appellant's compensation benefits, the burden shifts to appellant to establish that she has continuing disability after that date related to the accepted injury.¹² To establish causal relationship between an accepted condition and any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.¹³ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁴

ANALYSIS -- ISSUE 2

Given the Board's finding that OWCP properly terminated appellant's compensation and medical benefits, effective October 30, 2015, the burden shifted to appellant to establish that she remained entitled to compensation after that date.¹⁵ Evidence submitted after the termination of

⁹ *L.M.*, Docket No. 10-1172 (issued February 2, 2011).

¹⁰ *G.M.*, Docket No. 14-2057 (issued May 12, 2015). For example, in the case of *J.A.*, Docket No. 13-1657 (issued February 3, 2014). The Board held that medical reports from November 2010 were of limited probative value regarding the claimant's medical condition as of October 2012.

¹¹ See *C.P.*, Docket No. 15-0617 (issued August 4, 2015).

¹² *Manuel Gill*, 52 ECAB 282 (2001).

¹³ *R.D.*, Docket No. 16-0982 (issued December 20, 2016).

¹⁴ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁵ *J.P.*, Docket No. 16-1103 (issued November 25, 2016).

benefits included Dr. Dorsey's April 8, 2014 report. In this report, Dr. Dorsey opined that appellant was currently experiencing a major depression, which was a more severe form of dysthymia. He noted that appellant was free from mental symptoms until she injured her back and developed depression in response to the injury. Dr. Dorsey further noted that appellant continued to experience depression aggravated by health problems and life events, but not precipitated by these factors. He opined that appellant's back pain was the original precipitation of her depression. Dr. Dorsey further opined that from a psychiatric perspective, appellant was not presently able to work.

The Board finds that Dr. Dorsey's opinion is speculative. Dr. Dorsey indicated that his opinion was based on the information available to him. However, he did not review the statement of accepted facts prepared in this case and did not have all the relevant medical documentation for review. Dr. Dorsey failed to sufficiently explain how appellant's current mental health condition was due to her employment injury that occurred over 25 years prior to the date of his report, despite numerous other stressors in appellant's life.¹⁶ Accordingly, his opinion was insufficient to overcome the weight of the opinions of Drs. Andia and Ma.

Appellant also submitted the results of diagnostic studies interpreted by Dr. Wong and Dr. Kaushik. However, these studies are of limited probative value as they do not address the issue of continuing disability or whether she still had residuals from the accepted employment injury.¹⁷

Therefore, the Board finds that appellant has not met her burden of proof to establish disability or the need for medical care due to her accepted work injuries after October 20, 2013.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective October 20, 2013. The Board further finds that appellant has not established continuing disability after October 20, 2013.

¹⁶ See *supra* note 8.

¹⁷ See *L.L.*, Docket No. 16-0896 (issued September 13, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 24, 2016 is affirmed.

Issued: June 22, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board